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MOTION FILED APR 17 1953

IN THE

Supreme Court of the United States

OCTOBER TERM, 1952

No. 687

JULIUS ROSENBERG and ETHEL ROSENBERG,

Petitioners,

vs.

UNITED STATES OF AMERICA.

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF *AMICI CURIAE*

ROYAL W. FRANCE,
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104 East 40th St.,
New York, N. Y.

MOTION FOR LEAVE TO FILE BRIEF

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JULIUS ROSENBERG and ETHEL ROSENBERG,
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To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

The undersigned, as counsel for the signers of the accompanying brief as *amici curiae* and for approximately 20,000 other Americans who have specifically authorized, by their signatures, the inclusion of their names in this brief (see Exhibit A, form of authorization) respectfully moves this Honorable Court for permission to file said brief. Permission to file an *amicus* brief in this proceeding was sought from the Solicitor General on behalf of this large group of citizens. The request asked his consent to raise certain questions of law not raised in the original case and not directly involved in the present proceeding but going to the question of the propriety of the conviction and sentence. While recognizing that it would be most

unusual to raise new questions of law at this stage, the undersigned petitioners believe that the case itself is most unusual, involving as it does for the first time in the peace time history of the United States the infliction of the death penalty in a case of this nature. The undersigned hoped that under the circumstances the Solicitor General would consent to these matters of law being brought to the attention of this Honorable Court as bearing on the question of whether, under the circumstances present, the case should be remanded for a new trial.

The Solicitor General under date of Mar. 26, 1953 denied such consent as follows:

Royal W. France, Esq.
104 East 40th St.
New York 16, N. Y.

Re: Julius Rosenberg and Ethel Rosenberg
v. United States

Dear Mr. France:

I have your letter requesting consent to your filing an *amicus* brief in the above case. Inasmuch as it does not appear that you are representing persons who have any direct interest in the case, and since you wish to raise issues not presented by the petitioners, I do not consent to your filing a brief.

Sincerely yours,

ROBERT L. STERN
Acting Solicitor General

In view of this refusal the undersigned petitioners will not raise the issues not presented at the trial or directly by this appeal but do respectfully request this Honorable Court to grant the signers of this motion and its accompanying petition permission to file the accompanying short brief as friends of the Court since, even though their interest is not technically direct, it is direct in the very real sense that this case has aroused profound concern among multitudes of Americans, including the approximately 20,000 signers of Exhibit A.

WHEREFORE, IT IS RESPECTFULLY REQUESTED THAT THIS HONORABLE COURT GRANT THIS MOTION FOR LEAVE TO FILE THE ANNEXED BRIEF *amici curiae*.

ROYAL W. FRANCE,
Attorney for *Amici Curiae*,
104 East 40th St.,
New York, N. Y.

MOTION FOR LEAVE TO FILE THIS BRIEF AS FRIENDS OF THE COURT

IN THE

Supreme Court of the United States

OCTOBER TERM, 1952

No. 687

JULIUS ROSENBERG and ETHEL ROSENBERG,
Petitioners,

vs.

UNITED STATES OF AMERICA.

We, the undersigned, citizens of the United States, jointly and severally, respectfully ask leave of the Court to file this brief as friends of the court on behalf of the petitioners above named.

BRIEF *AMICI CURIAE*

We are deeply desirous that a new trial be granted in this case. Approximately 20,000 other Americans who are equally distressed have authorized the inclusion of their names in the petition to this Court (Exhibit A). Their signatures are being transmitted herewith.

In support of this petition we present the uncertainty and doubt which would afflict millions and would persist for the years to come if Julius and Ethel Rosenberg should

go to their deaths on the basis of a legal technicality, when the Court of Appeals for the Second Circuit has expressed the opinion that had defendants' counsel moved for a mistrial during the course of the trial it should or might have been granted. After calling the statement by Mr. Saypol, the prosecuting attorney, "wholly reprehensible," Chief Justice Swan went on to say:

> "Nevertheless we are not prepared to hold that it vitiates the jury's verdict when there is no allegation or evidence that any juror read the newspaper story and the defendants deliberately elected not to ask for a mistrial. Cf. Specckels v. Brown, 212 U. S. 208, 213-215. As they thus chose to have the trial continue, they obviously concluded that the prosecutor's statement to the press had not prejudiced the jury against them. Having themselves so concluded, they may not, after an adverse verdict, ask the Court to reach a contrary conclusion. Indeed, the petitioners did not mention the prosecutor's statement in their motions for a new trial nor on their previous appeal."

If this decision is allowed to stand, we and millions like us, will continue to be distressed at the thought that two people who were tried in a time of great emotional stress died because of the strange conclusion reached by the Court of Appeals. If this decision is not overruled it will appear that because an attorney, laboring under great stress in a most difficult situation, failed to make a motion for a mistrial at what the Court holds to be the proper time, the Rosenbergs may go to their deaths, whereas if the motion had been made at the proper time a mistrial might have been declared and a new trial ordered. Surely, even if there had been error or oversight on the part of the defendants' counsel in not moving for a mistrial at the proper time, the Rosenbergs should not die for his mistake. When we consider the statement made by defendants' counsel that he relied on the representation of the prosecution, which he discovered only after the trial to be in fault, and that defendants' attorney has been described

both by the trial court and the Court of Appeals as able and zealous, we are led to the conclusion that a new trial should be ordered. While in the interest of terminating litigation it may be true in the ordinary case that a client should pay the penalty for a failure by counsel to take suitable steps in a timely way, it seems unthinkable that this must be so when the penalty is death.

Moreover, in stating that it was not prepared to hold that the error vitiated the verdict "when there is no allegation or evidence that any juror read the newspaper story," the Court of Appeals is suggesting that the defendants should have done the almost impossible. The defendants would have found themselves confronted with imponderable difficulties in trying to prove whether the prejudicial statement had come to the attention of the jury. Certainly the whole trial was vitiated by loosely supported charges of communism and by questions as to the political opinions and activities of the defendants and the "reprehensible statement" of the prosecuting attorney may have been the final straw. The decision in *Delaney* v. *United States*, 199 Fed. 2d 107 indicates clearly the difficulty that would confront a defense in trying to determine whether jurors' minds had actually been influenced by prejudicial publicity. What emotions may or may not have been aroused in the jurors is hard to estimate. In Wigmore on Evidence Sec. 389, the author says truly:

> "The general inquiry is *what circumstances tend probably to excite a given emotion?*
>
> Obviously, the whole range of human affairs is here involved. It would be idle to attempt to catalogue the various facts of human life with reference to their potency in exciting a given emotion. Such an attempt would exhibit two defects. It would be pedantic, because it is impossible to suppose that the operation of human emotions can be reduced to fixed rules and that a given fact can have an invariable quantity of emotional potency. It would be useless, because the emotional effect of any fact must depend so often on the

> surrounding circumstances that no general formula could provide for the infinite combination of circumstances. Courts have always, therefore, been agreed that no fixed negative rules can be made, that no circumstance can be said beforehand to be without the power of exciting a given emotion." (Emphasis supplied.)

In this period there is always the danger mentioned by Mr. Justice Douglas in *Joint Anti-Fascist Refugee Committee, et al.* v. *McGrath*, 341 U. S. at 175:

> "In days of great tension when feelings run high it is a temptation to take a short-cut by borrowing from the totalitarian tactics of our opponents, but when we do so we set in motion a subversive influence of our own designed to destroy us from within."

We are not asking this Court to substitute public opinion for judicial decision. What we are asking is that the Court consider whether the decision of the jury may not have been unduly influenced by political prejudice and hysteria in part created by the acts of the prosecuting attorney himself. We are urging that in this case too much is at stake to allow the sentence to be executed as a result of a legal technicality. Otherwise grave doubts will persist and multiply that but for a legal mischance the Rosenbergs might have had an opportunity to demonstrate their innocence, if innocent they be, in an atmosphere less vitiated. Subsequent proof of innocence, if it ever came, would forever haunt us if the final decision had rested on whether an attorney had made a motion at the proper time.

These considerations are emphasized by the decision of the United States Circuit Court of Appeals for the First Circuit in *Delaney* v. *United States* (*supra*). If, in a case involving merely a prison term and where the offensive publicity released to the press was not, we believe, released in as inflamed a community as in the instant case, the conviction was held to violate the Sixth Amendment, it would seem certain that it did so in the case of the Rosenbergs.

Moreover the defendants were not confronted with proof of having actually transmitted secret information to the Soviet Union yet the Court in his charge to the jury said:

> "Bear in mind—please listen to this ladies and gentlemen—that the Government contends that the conspiracy was one to obtain not only atomic bomb information * * *; that the atomic bomb information *transmitted by the Rosenbergs* was classified as top secret."

Thus the Court stated to the jury that transmission, which was not proved, was involved and that the information was "classified as secret." From this the jury might have confused classification with proof of secrecy; yet the petition shows that the information was in fact not secret.

For this sort of error the Sixth Circuit Court of Appeals reversed the judgment and remanded for a new trial in *Thomas* v. *United States*, 152 Fed. 2nd 183.

The Court's attention had once been called to the erroneous statement that information had been transmitted and corrected it. Yet in the final instructions he repeated the statement that it had been *transmitted* and in imposing the death sentence made it clear that in his own mind the fact that incalculable damage had been done by this (unproven) transmission was the reason for the severity of the sentence.

Reliance by the Trial Court in instructions to the jury on matters not proved was held to be ground for reversal in *Leavenworth* v. *Hunt*, 78 U. S. 391.

We urge that in view of these and the other seriously prejudicial matters raised by the petition herein, this is not a trial record on which we, the citizens of the United States concerned with the historic result of this case, can look with confidence that justice has been done.

In the current situation of "the cold war" conditions prevailed at the trial of this case which put it into different

focus than that which existed when the conspiracy is alleged to have taken place. We feel that there is a danger against which only the Courts can guard and against which every effort should be made to guard, that in these cases where "loyalty" of defendants is raised the atmosphere may be so vitiated that trials will become trials in name only, the defendants being prejudged by the mere fact that the Government makes the charge. Under these circumstances, prosecutors should be scrupulously fair and Courts extraordinarily careful to see that defendants in such cases are accorded every safeguard against the substitution of prejudice for proof. We urge upon this Honorable Court that it would be better, far better, even at this late hour in this case that certiorari be granted to allow consideration of the problem of a trial conducted in an atmosphere tainted with hostility than that these young people, parents of young children, with hitherto unsullied reputations, should go to their deaths on a record so clouded with prejudice and doubt.

Respectfully submitted,

ROYAL W. FRANCE,
Attorney for *Amici Curiae*,
104 East 40th St.,
New York, N. Y.

JOSEPH BRAININ, New York,
EMILY ALMAN, New York,
DR. LEONARD TUSHNET, New Jersey.

Exhibit A

We believe that the trial of Ethel and Julius Rosenberg and Morton Sobell on a charge of conspiring to commit espionage which resulted in death sentences for the Rosenbergs and a 30 year sentence for their co-defendant, lacked guarantees of fairness which all Americans have a right to expect under the Constitution.

The U. S. Circuit of Appeals has called the Prosecutor's conduct "reprehensible." Justice Jerome N. Frank stated, "There are substantial questions of law. I would certainly not want to preclude their appeal to the Supreme Court. I would not want that to be on my conscience."

The F.B.I. admitted on December 2, 1952, that an important witness committed perjury under oath. Scientists all over the world call into doubt the scientific value of the alleged evidence and its credibility.

We believe that transient political and social passions have no place in our courts; and to deprive even one American of the right to a fair trial is to injure the rights of all Americans.

We therefore authorize the inclusion of our names in an Amicus Brief to the Supreme Court of the United States, petitioning that the verdict be set aside, and that a new trial be ordered based on Constitutional guarantees of impartiality and fairness in accordance with the best traditions of American justice.